DOCUMENT RESUME

ED 271 063 HE 019 444

AUTHOR	Smith, Eugene H.; Baron, Marvin J.
TITLE	Faculty Member's Guide to U.S. Immigration Law. Revised.
INSTITUTION	National Association for Foreign Student Affairs, Washington, D.C.
SPONS AGENCY	United States Information Agency, Washington, D. C.
PUB DATE	86
NOTE	53p.
AVAILABLE FROM	National Association for Foreign Student Affairs, Publications Order Desk, 1860 19th Street, N.W., Washington, DC 20009 ($1.00).
PUB TYPE	Guides - Non-Classroom Use (055) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	College Faculty; *Compliance (Legal); Eligibility; *Federal Regulation; *Foreign Nationals; *Foreign Students; Foreign Workers; Guidelines; Higher Education; *Immigrants; Laws; Recordkeeping; Refugees; Student Exchange Programs; Study Abroad; Teacher Exchange Programs; Travel

ABSTRACT

Immigration laws and regulations pertaining to foreign students and scholars are summarized as an aid to faculty members. Basic immigration documents and terminology are explained, including the passport, visa, immigration status or classification, Form 1-20 ID, the "green card", and Departure Record. Classes of nonimmigrants are described, including: J-1 exchange visitor students, M-1 vocational and technical students, and F-1 academic and language students. For the F-1 students, information is included on obtaining the visa, entering the United States, maintaining status, employment, transferring to another school, institutional record-keeping and reporting requirements, disclosure of information, and dependents. Classifications of foreign scholars are also covered, including: visitors for business and pleasure, practical trainee and F-1 postdoctoral student, exchange visitor, temporary worker of distinguished merit and ability, temporary worker, and trainee. Eligibility for immigrant and permanent resident status is discussed, along with numerical limitations and processing time. Additional topics include: school policies, immigration attorneys, U.S. income and social security taxes, and federal student financial aid. A chart provides information on types of visas. (SW)

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Faculty Member's Guide to U.S. Immigration Law

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Revised 1986

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The National Association for Foreign Student Affairs (NAFSA) is a nonprofit membership association that provides training, information, and other educational services to professionals in the field of international educational exchange.

This publication was funded by the Student Support Services Division of the U.S. Information Agency through a grant to the NAFSA Field Service.

Copies may be ordered from the Publications Order Desk, National Association for Foreign Student Affairs, 1860 19th Street, N.W., Washington, D.C. 20009

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INTRODUCTION

Faculty members who work with foreign students and foreign scholars need to have a basic knowledge of the immigration laws and regulations which govern the stays of those students and scholars in the United States. The purpose of this booklet is to provide a brief summary of these laws and regulations. It is not intended as a comprehensive statement, but as an aid to faculty members in understanding the limitations placed by immigration laws on foreign academic visitors.

The immigration regulations require that each institution which is approved by the Immigration and Naturalization Service (INS) to accept F-1 or M-1 nonimmigrant students identify a maximum of five "designated school officials," who are the only persons authorized to represent the institution in F-1 and M-1 student affairs and to sign immigration documents relating to F-1 or M-1 students. Similarly, each institution which has an exchange visitor program approved by the U.S. Information Agency to sponsor J-1 exchange visitor students or scholars is required to designate a "responsible officer" and "alternate responsible officers" to act for the institution in all exchange visitor matters. In most cases, institutions designate one or more of these persons to act for the institution in all other immigration matters. Usually the designated persons are staff members in the foreign student and scholar office or in some other office with a similar title. Questions and problems regarding immigration matters should always be referred to that office and those persons, as they are the ones who have the responsibility to know immigration laws and regulations and to interpret them to the campus community, and they are the ones who are identified by the institution to act as its spokespersons in all immigration matters.

Because of these legal and institutional restraints, and because immigration regulations and procedures are highly technical and complex, members of the campus community other than those who are officially designated to do so should not undertake to provide immigration advice or guidance to foreign students or scholars or to sign immigration papers for them on behalf of the institution. To do

so could lead foreign students or scholars into major errors and could cause serious problems for the student, the scholar, and the institution. The information in this booklet is provided as an aid to faculty members in understanding the problems faced by foreign students and scholars so that those faculty members can properly advise foreign students and scholars regarding their academic programs and can recognize when they should be referred to the foreign student and scholar office for assistance. Readers are cautioned to use this booklet for that purpose only.

Basic Immigration Documents and Terminology

Some immigration terms are often used incorrectly, leading to basic failures of communication. It is necessary to start with accurate definitions of these terms and then to use them precisely at all times.

A *passport* is a document issued by a government to identify a person as a citizen or resident of a particular country, to permit the recipient to travel abroad under the protection of that country, and to permit the person's re-entry to the home country. United States immigration law requires that all nonimmigrants (aliens who are not permanent residents of the United States), except Canadians and a few others, must have valid passports to enter and remain in the United States. Passports must be extended, renewed, or reissued by the alien's home government, usually through a consulate or embassy in the United States.

The United States *visa* is the stamp placed by a United States consular office on a page of the passport. It indicates that the consular officer has determined that the holder is qualified to apply for admission to the United States in a particular immigration classification. A valid visa does not ensure an alien's entry into the United States; the decision on his or her actual admission is made at the port of entry by an immigration officer, and usually that officer will require certain other information and evidence as to the intentions and good faith of the applicant. Some visas are valid for several days, some for indefinite periods, but the expiration of the visa does not necessarily have any relationship to the length of time the alien may remain in the United States. That period is indicated on the Departure Record, Form I-94 (see page 3), or in the cases of F-1 and M-1 students, on the Form I-20 ID copy (see page 2). The term "visa" is frequently used incorrectly to mean legal status and permission to remain in the United States. In fact, it has a more narrow and limited meaning.

Immigration status or classification is what defines an alien's legal status in the United States and describes the alien's presumed principal purpose of being in this country. Thus, we say that a foreign student holds F-1 student status, meaning that the person is in the United States for the principal purpose of being a student and that the sections of the law and regulations dealing with F-1 students define what he or she can and cannot do while in the United States. This student probably entered the United States with an F-1 student visa, but might have entered using some other kind of visa, such as a B-2 tourist, and then changed status in the United States from tourist to student. Therefore, it is inaccurate to describe the alien's *status* in terms of the type of *visa* which the alien holds or held at the time of entry. Rather, an alien's legal status is described by the particular immigration classification which has been granted by INS. Throughout this booklet we will use the term "status" and "classification" to describe accurately what is often inaccurately referred to as the alien's "visa."

The *Form I-20 ID copy* is a buff-colored card 3½" by 8" which is issued only to F-1 and M-1 students. The form I-20 ID copy carries the student's name, date of birth, country of citizenship, date of initial entry to the United States, the length of time the student is authorized to remain in this country, and a record of all other immigration actions such as extension of stay, transfer of schools, work permission, and authorization of practical training. M-1 vocational and technical students are given authorized stays which expire on a specific date, and that date appears on the Form I-20 ID copy. F-1 academic and language students are authorized to remain in the United States for "duration of status," indicated as "D/S" on the Form I-20 ID copy. Duration of status for an F-1 student means the time necessary for a student to complete a specific educational program, such as a bachelor's degree or a graduate program. The Form I-20 ID copy is a permanent record of an F-1 or M-1 student's stay in the United States as a student. The student retains the Form I-20 ID copy regardless of how many times he or she may leave the country for temporary absences. It is the basic immigration identifying document for F-1 and M-1 students only.

The *Departure Record* or *Form I-94* is a white card 3½" by 4¼" in size which identifies the immigration status of nonimmigrants other than F-1 or M-1 students. F-1 and M-1 students are also issued Forms I-94, but in their cases the forms are used primarily as a record of entry to and departure from the United States. In the cases of all other nonimmigrants, the Form I-94 carries a record of the alien's entry, immigration status, the date to which the alien is authorized to remain in this country, extensions of stay, changes of status, and any other immigration transactions during any one period of stay in the United States. The Form I-94 is surrendered upon the alien's departure from the United States to record that departure in INS files, hence the title Departure Record. The Form I-94 must be kept valid at all times, and if the alien wishes to remain in the United States beyond the expiration date indicated on the form, the alien must apply to INS for extension of stay.

The Form I-20 ID copy and the Form I-94 are the documents which many persons erroneously refer to as the visa. They are clearly more important identifying documents than the visa, for they show the alien's current status in the United States, whereas the visa only shows that the alien was permitted to apply for entry into this country in a particular immigration classification.

"*Green card*" is the term commonly applied to the card more properly called the *Alien Registration Receipt Card, permanent resident card,* or *Form I-151* or *I-551*. It identifies the alien as a permanent resident of the United States. The "green card" was originally green in color, for several years it was blue, and the current version (Form I-551) is white and salmon in color. The term "green card" has stuck regardless of the actual color of the document. It is a laminated card 2⅛" by 3½" in size, and it carries a photograph of the alien, the date of the alien's admission to the United States as a permanent resident, and the alien registration number (an eight-digit number preceded by the letter A).

In order to know and understand the current legal status of any alien, one must see one or more of these documents. In the case of a nonimmigrant, the passport and the Form I-94 or F I-20 ID copy

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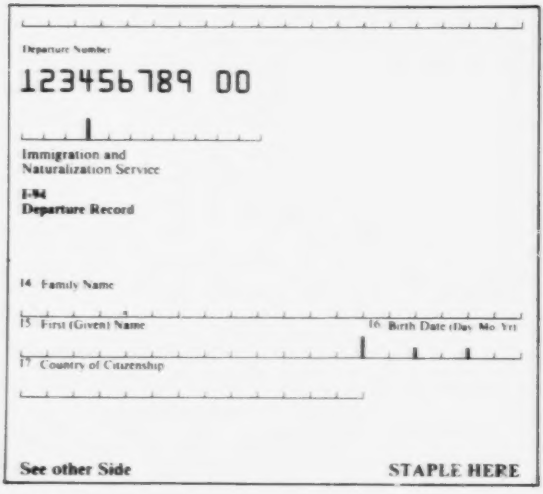
are the most important documents; in the case of the immigrant, the "green card" or Alien Registration Receipt Card is the vital one.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Immigration and
Naturalization Service

I-94
Departure Record

14 Family Name

15 First (Given) Name

16 Birth Date (Day Mo Yr)

17 Country of Citizenship

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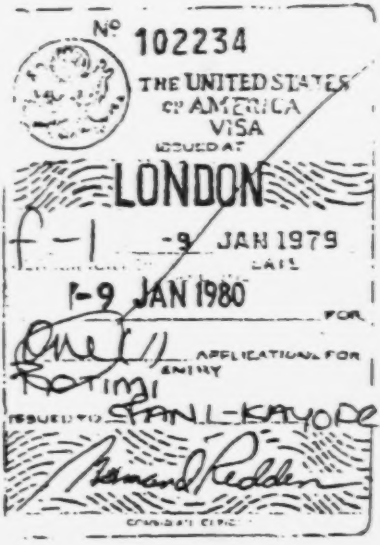
Form I-94



VISA

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Foreign Students

There are several reasons why faculty members should have some understanding of the immigration regulations which govern foreign students. First, faculty members should understand the concern and even fear that many foreign students feel in the face of immigration laws that are often perceived as threatening their right to remain in this country. Second, faculty members need to know something about the limitations which the immigration regulations place on the flexibility of a foreign student's academic program, employment, nonacademic training, and plans for the future. All of these matters will influence to some degree the manner in which a faculty member advises and guides a foreign student in his or her study program.

For purposes of immigration law, foreign students are divided according to their immigration classifications. F-1 academic and language students are the most common on college and university campuses, and they constitute the bulk of what we call "foreign students." M-1 vocational and technical students are common on the campuses of some community colleges, vocational and technical schools, and in some four-year institutions which offer vocational and technical programs. J-1 exchange visitor students are smaller in number but important, as they constitute the group of students who are sponsored by the United States government or other sponsoring agencies. A fourth category of foreign students is made up of immigrants and refugees, students who have the right and presumably have the intention to remain in the United States permanently. A fifth category is composed of various kinds of nonimmigrants who are in the United States for some principal purpose other than study, dependents of other aliens, and perhaps those who are here illegally or without documentation. Each of these kinds of foreign students is governed by different regulations and each kind will be dealt with separately in the following paragraphs.

F-1 Academic and Language Students

An F-1 student is defined in the Immigration and Nationality Act as a person who has a residence

in a foreign country to which he or she plans to return, and who comes to the United States temporarily and solely for the purpose of attending a "college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or . . . a language training program" which has been previously selected by the student and approved by the Attorney General for study by foreign students. Note some of the important elements contained in this definition: maintaining a residence in a foreign country, intending to return home, temporary stay in the United States, purpose of being here exclusively to attend an academic school previously selected by the student and approved by the Attorney General.

Obtaining an F-1 Visa. To apply for admission to the United States as an F-1 student, an alien must first apply for and be granted admission to a school which has been previously approved by INS (acting for the Attorney General) to accept F-1 academic foreign students. When the applicant is granted admission to the school, he or she is sent Form I-20A-B, Certificate of Eligibility for F-1 Student Status. Before issuing Form I-20A-B to a prospective student, the school is required to determine on the basis of a written application and records that the student is qualified academically, linguistically, and financially to attend the school and to profit from the instruction available there. Failure by the school to make these determinations before issuing Form I-20A-B constitutes grounds for canceling the INS approval of the school to accept nonimmigrant foreign students. That fact may help to explain to faculty members why admissions officers sometimes seem to be excessively cautious about the details and the documentation of a prospective student's qualifications.

Upon receiving Forms I-20A-B showing admission to a school, students take that form, their passports, and evidence of the source and amount of their financial support to the United States consulate which has jurisdiction over their place of residence (note that this can sometimes be a consulate attached to an embassy). Students must then demonstrate to the consular officer that they are *bona fide* students, that they have sufficient funds to provide for all of their expenses in the United

States, that they actually intend to attend their school, and that they have a residence in their home country to which they are definitely committed to return. Several of these points are subject to wide latitude of interpretation by the consular officer, but none is more troublesome than the final one regarding the ultimate intention of the student. The consular officer is not only authorized, but is *required*, to determine the intent of the applicant, and the consular officer's determination and decision are not subject to appeal or review. Thus, we find frequently that students who appear to us to be *bona fide* students are not issued visas because the consular officer has determined that they do not intend to return home (perhaps on no firmer ground than the existence of a United States citizen brother), or do not meet some other qualification necessary to be an F-1 student under the law. Such determinations are final, and it is very rare that a consular officer can be convinced to change an initial determination of an applicant's intent.

Entering the United States. If the consular officer finds the applicant to be qualified in all ways, the officer will stamp a visa on a page of the applicant's passport. The visa stamp gives the student permission to apply at a port of entry for admission to the United States. At the port of entry, the student must again produce the Form I-20A-B issued by the school, show evidence of financial support, and convince the immigration inspector that he or she is qualified in all ways to be admitted to the United States as an F-1 student. If the immigration inspector's determination is positive, the student is considered to have been inspected and admitted to the United States. The student will be issued Form I-94, Departure Record, and Form I-20 ID copy (see page 2) indicating the date and place of admission to the United States, the F-1 immigration classification in which the student was admitted, and that the student is authorized to remain in the United States for "duration of status." Duration of status means the length of time necessary for the student to complete a specific program or level, such as a bachelor's degree or a graduate program. If the student wishes to remain in the United States for an additional academic program, he or she must apply to INS for permission to do so and for exten-

sion of stay. Failure to obtain this permission from INS constitutes a violation of status.

Maintaining Status. In order to maintain status as an F-1 nonimmigrant student, the student must attend the school whose Form I-20A-B was used to gain admission to the United States. The student may not attend a different school until he or she has attended the original school for at least some period of time and applies for transfer of schools. The student must attend school full time for at least nine months of the year. Students in semester system schools may take the summer off as a vacation; students in quarter system or trimester system schools may take off any one of the terms as an annual vacation. An undergraduate student must carry at least 12 credit hours each school term. Any deviation from this minimum requirement should be discussed by the faculty adviser and the foreign student adviser. The regulations allow the individual school to determine what constitutes full-time attendance by graduate students, but they, too, must attend school for nine months each year. Additional requirements of maintenance of status include keeping a valid passport at all times, not accepting unauthorized employment, and not transferring schools without going through the prescribed procedures. If a student fails to maintain status in any of these ways, that failure constitutes grounds for required departure from the United States.

Employment. An F-1 student is required to demonstrate full financial support in order to obtain an F-1 visa and be admitted to the United States as a student. Therefore, the assumption of the law is that the student will not be employed and thus take jobs away from United States workers or students. Exceptions to this policy are the following:

1. A student may be employed on campus as a research assistant or teaching assistant or in connection with a fellowship without prior approval from anyone. Such employment is considered a part of the student's educational program.

2. A student may be employed in other on-campus positions, if such employment will not interfere with the student's ability to carry a full program of study and will not displace a United States worker. Although the regulations do not prescribe how

these determinations are to be made, many campuses have established procedures to require clearance by the foreign student adviser before an F-1 student may be employed on campus.

3. A student may qualify for off-campus employment only if the student has been in F-1 status for at least 12 months and can demonstrate an unforeseen change in financial circumstances which arose after admission to the United States and which makes it necessary to work for essential financial support. The student must apply through the foreign student adviser to INS and must convince both that these requirements are met. If the student is successful, INS will note the work permission on the student's Form I-20 ID copy. The student is authorized to accept off-campus employment *only* when INS has returned the endorsed Form I-20 ID copy to the student. The student may then work a maximum of 20 hours per week while school is in session and full time during vacation periods. A significant portion of applications for off-campus work permission are denied by INS.

4. A student may be authorized to be employed for practical training for a maximum period of 12 months if it can be demonstrated that the training is directly related to the student's academic studies and is of a type that is not available in the student's home country. The student may engage in practical training after finishing an educational program; between one program and another (e.g., between a master's and a Ph.D program); after completing all course work for a degree; during the annual vacation periods, if that is recommended by the school; and in some cases, as a participant in cooperative education, alternating periods of work and study if such programs are a part of the regular curriculum of the school the student attends. However, except for certain cooperative education programs, the student may undertake practical training only after having applied for and received authorization for that training from INS.

Note that certain kinds of employment are *not* authorized by any of these exceptions to the no-work policy. Study-related off-campus work is not authorized unless the student qualifies for off-campus work on the basis of economic need after at least one year in F-1 status or qualifies for prac-

tical training. Internships and other paid positions made available for the experience and training of students are not open to foreign students unless the positions are considered on-campus employment or qualify as practical training. Even jobs that do not pay a wage, such as free room and board in exchange for gardening or baby-sitting, are not authorized unless the student has permission for off-campus employment because of economic need. NAFSA and the international education community continually urge changes in these restrictive employment policies, but such pleas have so far been largely unsuccessful because of the fear that foreign students will take jobs which would otherwise be held by United States workers or students.

Transferring to Another School. An F-1 student may transfer to another school only after completing certain specified procedures. If the student is transferring to another school to continue in the same degree program, he or she may enroll in the new school after having submitted a new Form I-20A-B to the designated school official of the old school and had that form endorsed by the school official. If the student is transferring schools to begin a new degree program, he or she must submit an application to INS for permission to transfer. The student may enroll in the new school only when that application is approved by INS or 60 days after making the application, whichever is earlier. Since it is frequently impossible to apply for transfer more than 60 days before the registration date of the new school, and since INS often takes well over 60 days to act on applications, students are often put in a position of violating the regulations through no fault of their own. Fortunately, violations of this nature are usually overlooked by INS, but they do put the student in an insecure position with regard to maintaining status.

Institutional Record-Keeping and Reporting Requirements. The immigration regulations require that a school enrolling F-1 students must maintain specific kinds of records and documents on those students and must release the information from those records to INS officers upon request. The regulations also provide that the school must report periodically on INS-produced lists whether each of the students on those lists is maintaining a full-time

course of study, and must add to the lists the names of any other F-1 students who are attending the school. Failure to maintain these specified records, to release the required information to INS officers, or to respond to the INS lists constitutes grounds for INS to revoke the school's authorization to enroll F-1 students.

Disclosure of Information. The information which the school must maintain and disclose to INS is specifically enumerated in the regulations. The school is not required to disclose other kinds of information about the student, such as working without authorization, nor to disclose to INS information which is not officially part of the school's required records. However, what is and what is not required of the institution is not always as clear as it might be and sometimes disputes arise between the institution and INS as to what information must be provided. Such disputes are made more complicated by the provisions of the Family Educational Rights and Privacy Act (FERPA, also known as the Buckley Amendment), by a supposed "release of information" statement which the student signs in an inconspicuous place on the back of Form I-20A-B, and by institutional policies (and advisers' proclivities) regarding the confidentiality of information about students. These disputes are not easy to resolve, but most campuses follow a very conservative and protective policy regarding release of any information to INS other than that which is specifically spelled out in the regulations. Faculty members are advised not to disclose any information about foreign students to INS officers except under the most unusual circumstances. It is prudent to refer all such inquiries from INS to the foreign student adviser in order to avoid violating the laws governing privacy of students' records and to preserve the proper educational relationships between the faculty member and the student.

Dependents. Dependents of F-1 students (spouse and unmarried minor children only) can be admitted to the United States in F-2 status. They are admitted for the purpose of accompanying the principal F-1 student to the United States. F-2 dependents are not authorized to accept employment under any circumstances. They may attend school, full or part time, while retaining their F-2 status.

M-1 Vocational and Technical Students

The classification of M-1 vocational and technical students was created in 1981 by Public Law 97-116 to separate nonacademic students from academic students. An M-1 student is defined in the law similarly to an F-1 student, except that the M-1 student comes to the United States to attend "an established vocational or other recognized nonacademic institution" other than a language training program.

While the language of the legal definition of an M-1 student is similar to that of an F-1 student except for the above distinction, the regulations governing M-1 students are much more restrictive than those governing F-1 students. The most important differences are the following:

1. An M-1 student is admitted to the United States for a specific period of time of not more than one year. If the student needs additional time to complete a vocational or technical program of study, the student must apply to INS for extension of stay.

2. An M-1 student is not authorized to accept any employment except for a maximum period of up to six months of practical training after having completed a program of study. Unlike an F-1 student, an M-1 student is not permitted on-campus employment, off-campus employment because of economic necessity, or practical training before completing studies.

3. An M-1 student may not transfer schools after having been in M-1 status for a period of six months, unless that transfer of schools is necessary because of reasons beyond the M-1 student's control.

4. An M-1 student may not change educational objectives. If the student enters the United States in M-1 status to complete a program in electronics technology, he or she may not change that objective and may not remain in this country to progress beyond that objective except for a period of up to six months of practical training.

5. An M-1 student may not change to F-1 status. For example, the student who completes a program in electronics technology may not change to F-1 status to enter a program in electrical engineering. That student may return home, apply for a new

F-1 visa, and re-enter the United States in F-1 status, but cannot change from M-1 to F-1 status in the United States.

6. The Certificate of Eligibility for M-1 status is known as Form I-20M-N to distinguish it from the Form I-20A-B used for F-1 students.

In creating the M-1 student category in 1981, Congress clearly intended to distinguish between academic and nonacademic students by making the regulations for M-1 students more restrictive than those for F-1 students. However, the specific differences enumerated above are not part of the legislation creating the M-1 classification, but were written by INS in regulations published pursuant to the new law. Many educators question whether the very restrictive provisions of the M-1 regulations exceed the intent of Congress. Nevertheless, those restrictive provisions remain in the regulations and therefore have the force and effect of law.

Dependents of M-1 students (spouse and unmarried minor children only) can be admitted to the United States in M-2 status. Like the dependents of F-1 students, they are admitted for the purpose of accompanying the principal M-1 student to the United States. M-2 dependents are not authorized to accept employment under any circumstances. They may attend school, full or part time, while retaining their M-2 status.

J-1 Exchange Visitor Students

The exchange visitor classification is used for a variety of educational purposes. Under exchange visitor status, students, scholars, trainees, professors, researchers, and similar persons may come to the United States for temporary periods for the purpose of educational exchange under the sponsorship of an organization or institution which has previously been approved by the U.S. Information Agency (USIA) as an exchange visitor program sponsor. Students may come to the United States in J-1 exchange visitor status if they are participants in a sponsored program (such as the Fulbright program) or under the sponsorship of their United States college or university if it is designated as an approved exchange visitor program sponsor.

Students who are in J-1 status are subject to many of the same regulations, procedures, and restrictions as are those in F-1 status, but there are some very important differences:

1. The J-1 student is considered a "sponsored" student and must have a sponsoring agency, which may or may not provide financial support. The university may be that sponsoring agency for immigration purposes. If so, there exists a special relationship of sponsorship between the university and the student. Exactly what that means is a matter of interpretation for each institution, but it does imply a greater degree of responsibility on the part of the institution than does the F-1 classification.

2. Sponsoring agencies have considerable authority to impose additional requirements on the student over and above those for F-1 students in matters such as the definition of a full program of study, whether the student can change fields of study, obtain an extension of stay, or transfer to another school or sponsorship. For example, an exchange visitor sponsor has the authority to deny a student the right to continue in the United States for an additional degree program or other purpose. Sponsoring agencies do frequently exercise that authority in order to force the prompt return home of their students to carry out the sponsor's objectives in bringing the student to the United States.

3. The sponsoring agency has the authority to grant off-campus work permission to the J-1 student without referring the matter to INS if the sponsor determines that the employment is necessary because of an "urgent financial need which has arisen since acquiring exchange visitor status" and will not cause the student to fail to carry a full program of study.

4. J-1 students are eligible for up to 18 months of practical training, as determined by the program sponsor, after completing their educational programs, compared to the maximum of 12 months which can be authorized for F-1 students.

5. The J-2 dependents of J-1 students can be authorized by INS to accept employment if they can demonstrate that the income from the employment will not be used for the financial support of the J-1 student.

6. A J-1 student is not allowed to change educational objectives. The student may change fields of study or degree objectives (provided the sponsor approves), but may not switch from one category of exchange visitor to another, e.g., from student to research scholar or from student to professor.

7. Certain J-1 exchange visitors are required to live in their home countries for a period of two years after completing their exchange visitor programs before they are eligible to apply for immigrant status or for nonimmigrant status as temporary workers, trainees, or intracompany transferees. The two-year home country residence requirement applies only to those exchange visitors who (1) are financially supported by the United States government or their home governments; or (2) have skills which are needed in their home countries, as specified in the Exchange Visitor Skills List; or (3) are medical doctors who have graduated from a foreign medical school and have come to the United States to undertake graduate medical training. The purpose of the home country residence requirement is to enforce the return home of exchange visitors in order to carry out the educational exchange objectives of their program sponsors. Waivers of the residence requirements can be granted for specific reasons, but such waivers are extremely difficult to obtain.

8. Exchange visitors who are subject to the two-year home country residence requirement may not change to another nonimmigrant classification. For example, a J-1 student who is subject to that requirement is prohibited from changing to F-1 status except by going out of the country, applying for a new F-1 visa, and re-entering the country in F-1 status.

In some ways the J-1 classification permits greater freedom and flexibility for students, and in other ways it imposes greater control. It allows greater flexibility in the matter of employment, in practical training, and (perhaps most important to many students) in the fact that J-2 dependents may receive permission to be employed. It provides for greater control in the sense that a sponsoring agency can impose requirements in addition to those specified in the law and regulations, prohibits (in some cases)

a change in classification to another nonimmigrant status, and in some cases imposes a home country residence requirement before the student can become a permanent resident, temporary worker, trainee, or intracompany transferee.

The basic document necessary for an alien to apply for a J-1 visa and J-1 status is the Form IAP-66, Certificate of Eligibility for Exchange Visitor Status, issued by the sponsoring agency. The applicant follows procedures similar to those for F-1 status in applying for a visa, entering the United States, and maintaining status.

Immigrants and Refugees

Immigrants or permanent residents are persons who are admitted to the United States for the purpose of residing here permanently. They can be identified by their possession of a "green card," the Alien Registration Receipt Card, which is described in an earlier section of this booklet. Immigrants may apply for United States citizenship after a period of five years' residence (three years if married to a United States citizen), but they are not required to do so, and they may remain in the United States indefinitely as long as they retain a residence here and are not convicted of certain kinds of crimes which would make them subject to deportation.

The Refugee Act of 1980 made substantial changes in the law governing refugees and asylum. It defines a refugee as a person who seeks admission to the United States because he or she is unable or unwilling to return to the home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." A person seeking asylum is one who applies for refugee status from within the United States or at a port of entry or land border. After admission to the United States, refugees are considered to be in temporary status for a period of one year, at which time they are converted to permanent resident status retroactively to the date of their entry to this country or attainment of refugee status. During their one-year waiting period, refugees can be identified by their possession of a Form I-94, Departure

Record, which specifies refugee status. After that time they are permanent residents and can be identified by their possession of a "green card" or Alien Registration Receipt Card.

For most college or university purposes, immigrants and refugees can be treated much like United States citizens. Of course, they cannot vote or hold political office, but, unlike F-1 students and J-1 exchange visitors, they are eligible for federal financial aids, may be employed without restrictions of the immigration laws, in most states can become residents for tuition purposes in public institutions, and generally have many of the same privileges and responsibilities as United States citizens. If they are males between the ages of 18 and 26, they are required to register with the Selective Service System. Their own intentions may or may not correspond to this generalization, as some of them obtain immigrant status as a matter of convenience or expediency, but under the law they are presumed to have the intention to reside permanently in the United States.

Practices differ from one campus to another as to whether immigrants and refugees are considered foreign students. In many cases they will not be considered foreign students and will not be included on the lists or in the files of the foreign student adviser. Because of different educational, linguistic, and cultural backgrounds, they frequently need many of the same kinds of special services and programs as foreign students. Some immigrants and refugees are seriously deficient in English language proficiency, and in some cases this affects not only their academic progress, but their ability to advance in a professional field after graduation. Faculty members need to be alert to those problems that might impede the academic and future work of their immigrant and refugee students.

Other Classes of Nonimmigrants

Other types of nonimmigrant students that faculty members are likely to encounter include diplomats or government officials, international organization employees, temporary workers, and the dependents of these and other kinds of nonimmigrants. In most cases, such nonimmigrants are in

the United States for some purpose other than to be students, and they are defined in the immigration law according to their primary purpose for being here. In some cases, it may be necessary or advisable for them to change their immigration classifications if they are to remain as students. Always refer any possible cases of this nature to the foreign student adviser for assistance.

Some potential students enter the United States as B-2 visitors and then gain admission to a school and apply for change to F-1 or M-1 student status. If the student has informed the consular officer of those intentions and the consular officer agrees that the applicant is qualified to be a student, the consular officer will mark the visa "prospective student." In such cases, a change from visitor to student classification presents no particular problem. If this notation is not on the visa or on the Form I-94, INS may refuse to change the applicant to student status on the grounds that the alien should have applied for a student visa in the first place (or a B-2 prospective student visa), and that the entry to the United States was fraudulent because the true intent of the student was concealed. Only in those cases where the applicant can demonstrate that the decision to study in the United States was made after entry into this country can the student assume that the application for change to student status will be approved by INS.

For a chart listing the various classifications of nonimmigrants and the symbols applied to them, please refer to the chart at the back of this booklet.

Change to Immigrant Status

Students in F-1, J-1, or other nonimmigrant classifications may approach faculty members for assistance or advice in changing status to a permanent one. First of all, faculty members should heed the earlier advice to avoid giving information of a technical legal nature to such students, for they could be badly misled by an innocent and minor error. Such inquiries should usually be referred to the foreign student adviser. Second, in providing general assistance to such students, faculty members should consider the assumptions of the immigration law—namely, that students are here temporarily

and solely for the purpose of attending school or for whatever other legitimate nonimmigrant purpose they have. The law assumes that they intend to return to their home countries, and it is the exceptional case that can avoid that result. Third, faculty members may want to consider the basic educational and international philosophies of their institutions regarding the acceptance and training of foreign students. Were these students admitted for the purpose of staying in the United States or in order that they might return to their home countries and benefit their people? Such considerations are complex and defy simple conclusions, but they warrant examination by faculty members in determining whether or not to encourage a foreign student to attempt to remain in the United States permanently or for an extended period.

Regardless of any other considerations in this area, it is not easy for a foreign student to qualify for permanent residence in the United States. In order to do so, the student must either have a close family member who is a United States citizen or permanent resident (marriage to a United States citizen or permanent resident can accomplish that purpose), or the student must qualify for refugee or asylee status, or must have occupational skills which are in great demand and which will qualify the student for a labor certification. The labor certification is difficult to obtain and is a major obstacle to many foreign students who may wish to remain permanently in the United States. Most are not able to remain here even though they may seriously want to do so. For further information on the requirements and procedures for obtaining permanent residence, see the later section of this pamphlet entitled "Immigrant or Permanent Resident," pages 30 through 39.

Foreign Scholars

A foreign scholar is normally defined as an alien who holds a nonimmigrant status and is engaged in scholarly activity, such as teaching, conducting research, or gathering material for a book at a university, college, research institute, laboratory, or hospital, but who is *not enrolled* in any formal academic program. It is important to distinguish clearly between such scholars and the many foreign students on our campuses, since the immigration options and conditions differ in many crucial respects for the two groups. Although aliens may be eligible to work in various *nonacademic* positions on our campuses, such aliens usually are not classified as foreign scholars, even though under certain conditions institutions may file visa petitions on their behalf. Many institutions with substantial numbers of foreign scholars (100–150 and above) now have specialists or suboffices to provide specialized knowledge and skilled assistance to these scholars and the academic departments which invite them.

As the flow of knowledge and the travel of scholars moved beyond national borders so dramatically in the last decade, the problems encountered in bringing foreign scholars into this country in the proper status have increased. Many of the problems stem from restrictions written into federal law and regulation (most of which are designed to protect American labor and to limit the number of aliens coming into the United States for employment) and the delays common to the processing of immigration petitions. Difficulties are also generated by the lack of familiarity on the part of many faculty members with the basic conditions of the main immigration classifications, as well as some degree of impatience they feel when they sense that "red tape" is about to impede their effort to bring talented academicians from abroad to their laboratories or classrooms. The purpose of the following pages is to make more comprehensible to faculty members the major immigration classifications and the peculiarities of each so that they can avoid those problems that are avoidable and deal most effectively with those that are not.

The academic objectives of foreign scholars fall into a vast array of different categories, but when

seen from the perspective of time and long-range plans, foreign scholars can be divided into four major types:

1. Scholars who are in the United States for short visits of a few weeks or months and who have definite plans to leave the country at the end of that time. Usually these scholars hold B-1 or B-2 visitor status, although a different status would have to be considered if they are to receive a salary or an honorarium during their stay.

2. Scholars who are in the United States for longer visits, i.e., more than a month or two but less than three years, and who have definite plans to leave the country at the end of their academic visits. Most scholars in this category hold J-1 exchange visitor status, although the H-1 status would be preferable for those whose stay might extend beyond the three-year limit applicable to J-1 exchange visitors.

3. Scholars who are in the United States for longer visits, as in (2), but who are considering the possibility of remaining in the country for an indefinite period of time, either at the same institution or in a different employment setting. Scholars in this category would likely find the H-1 temporary worker status most appropriate, although the J-1 status is a possibility in some situations.

4. Scholars who are in the United States with a definite intent to seek permanent residence and who have found an institution interested in offering them long-term employment and in assisting them to obtain permanent residence (immigrant status). Such scholars must apply for immigrant status.

The Immigration and Nationality Act states that aliens who seek to enter the United States are presumed to be intending immigrants unless they can demonstrate that they fit into one of the nonimmigrant classifications defined in the law. In order to qualify for nonimmigrant status in the classifications of most interest to us, they must show that they have a residence in a foreign country to which they intend to return. This is significant because aliens who reveal to an American consular officer that they have possible interest in obtaining immigrant status in the United States are likely to be denied nonimmigrant visas on the grounds that

their statements pointed to uncertainty about their intent to return to a residence abroad.

An alien who can demonstrate a clear intent to return to a residence abroad and who meets certain other conditions may qualify for a nonimmigrant visa (see pages 1 and 2 for definitions of "visa" and "status"). There are almost 20 types of nonimmigrant visas, but only a few of these are normally available to foreign scholars. They are described in the following paragraphs.

B-1 Visitor for Business

Although most commonly used by foreign businessmen, the B-1 visitor for business classification is clearly available to scholars planning to pay short visits to one or several campuses. It is not intended for use by a scholar accepting any type of formal academic appointment for a term or longer. Reimbursement is possible from a United States source for travel expenses and subsistence *(per diem) only;* no salary or honorarium is permitted. Although INS does not police the latter prohibition and some institutions pay no heed to it, disregard of it can often create considerable hardship for the scholar and embarrassment to the institution, since it may be impossible to honor a promise made earlier to pay a scholar an honorarium. Unfortunately, not all individuals working in our embassies and consulates are fully aware of this prohibition. If there is knowledge of the intent to make such a payment to a scholar before entry to this country, it is almost always possible for the scholar to obtain a different visa which permits such payments. The only documents needed to obtain a B-1 visa are an invitation from an institution in this country and a showing of adequate finances.

B-2 Visitor for Pleasure

The B-2 visitor for pleasure classification can be used by a scholar who is touring the United States but who also wishes to pay an academic visit to a campus during his stay in this country. An alien in B-2 status is not permitted to be paid in any way from a United States source. If the alien indicates, upon requesting a visa, that he or she plans to combine an

academic visit to this country with sightseeing, the alien is likely to be given a B-1/B-2 visa and be admitted in B-1/B-2 status, which does confer the right to be reimbursed for travel and subsistence. The same comments made above about honoraria (or similar payments) to those in B-1 status apply fully to those in B-2 status, and institutions should encourage a scholar to avoid this status, in spite of the great ease in acquiring it, if there is any planned reimbursement. The only document needed to obtain a B-2 visa is a showing of adequate finances.

F-1 Practical Trainee and F-1 Postdoctoral Student

The F-1 student classification is normally used by foreign students enrolled in formal academic programs, but there are two instances in which foreign students may work in F-1 status after completion of their studies.

Practical Training. Foreign students who have just completed their degrees in this country may engage in either academic or nonacademic employment for up to 12 months if the work is directly related to their fields of study and if such employment is considered to be unavailable in their countries. (See section on F-1 students.)

Postdoctoral Status. An alien who has completed a doctorate in this country or abroad may continue in F-1 status or secure an F-1 visa to enter this country in order to engage in postdoctoral research and study. The position must be within the normal limits of postdoctoral research and thus could not be a regular staff position. Nor could the alien do any teaching while in this status. INS regulations do not set up a specific time limit for F-1 postdoctoral students, but the INS Operations Instructions indicate that F-1 postdoctoral status will normally be limited to three years, since a postdoctoral appointment usually does not last for more than two or three years. Although it is not specifically prohibited by regulation, INS would normally not allow an F-1 student to have both a period of practical training and a period of postdoctoral student status.

The documents needed to obtain a visa for postdoctoral research are a Form I-20 noted for "post-

doctoral research and study" and evidence of financial support. Aliens already in this country in F-1 status need only extend their stays as continuing students, unless they accept a postdoctoral position at a new institution, in which case they would need to apply for INS permission to transfer to the new school. In either instance, the application would be made on Form I-538.

J-1 Exchange Visitor

The J-1 exchange visitor category is the classification most commonly used by foreign scholars in this country. The designation "exchange" refers primarily to the exchange of knowledge across national borders and only peripherally to reciprocal exchange-of-persons programs between institutions or governments. Any alien who has sufficient academic training to benefit from an academic or professional program at a United States college, university, laboratory, research institute, hospital, or business may be eligible for this status if the host institution or facility has an exchange visitor program authorized by the U.S. Information Agency. To receive such authorization, an institution must delineate the kinds of academic objectives it would help aliens to achieve and demonstrate its capacity to meet certain professional standards in carrying out the requirements of the USIA. To obtain full particulars on this qualification process, institutions and organizations should write the Exchange Visitor Facilitative Staff, United States Information Agency, Washington, DC 20547.

Students are eligible for this status (see section on J-1 students), but most aliens using it are in one of the other categories, i.e., trainee, teacher, professor, research scholar or specialist, international visitor, or medical trainee. It is important to note that J-1 exchange visitors may not change their academic objectives while in this country. Thus, if it is known that they are coming in some dual capacity, e.g., researcher/student, that fact should be noted on the Form IAP-66, Certificate of Eligibility for Exchange Visitor status, that is issued. Transfer from one institution to another is usually permitted if the academic objective remains essentially unchanged, provided that the aliens are still within the overall time limit for their categories.

Foreign faculty and researchers are subject to a three-year limit to their stays, and getting any substantial extension beyond three years is extremely difficult.

Aliens coming to this country in J-1 status are subject to a two-year home country residence requirement if their financial support comes from the United States government, the foreign government, or an international organization; if their country and field of specialization are listed on the Exchange Visitor Skills list, which indicates the manpower needs of most developing countries in the world; or if they are foreign medical graduates. Exchange visitors who are subject to this requirement may not become immigrants, H temporary workers, or L intracompany transferees until they have spent two years in their home countries following completion of their stays in exchange visitor status. They are also prohibited from changing to any other nonimmigrant status while in the United States. If the exchange visitor is not subject to the home country residence requirement, there is no specified minimum time that must be spent outside the United States before returning in exchange visitor or some other status.

Research scholars who receive funding from a United States government research grant awarded to an institution for a specific research objective are *not* considered to be subject to this requirement because of government funding. They would be subject to the requirement only if the funding were awarded for an international exchange objective, e.g., the improvement of the teaching of law in Indonesia.

It is possible to have the home country residence requirement waived, but such waivers are difficult to obtain, especially if United States government funding has been involved. Thus, an institution should make certain that scholars about to come to this country in J-1 status are fully aware of the possibility of being subject to this requirement and the consequence of it. Any scholar who is even remotely considering the possibility of staying in this country on a permanent or long-term basis and who might be subject to the home country residence requirement should avoid the J-1 visa whenever possible.

The only document needed to obtain the J-1 visa and enter this country in J-1 status is the Form IAP-66 issued by the exchange visitor program sponsor. The Form IAP-66 indicates in some detail the academic objective to be pursued and the source and amount of the exchange visitor's funding.

Dependents (spouse and unmarried children under 21) of exchange visitors enter this country in J-2 status. They may seek work authorization from INS if they can demonstrate to the Service that the employment is intended to cover certain expenses of the dependents. The dependent's earnings may not be used to cover any expenses of the J-1 principal. Dependents in other immigration classifications, e.g., F-2 and H-4, are not permitted to be employed under any circumstances.

H-1 Temporary Worker of Distinguished Merit and Ability

In recent years, no immigration classification has undergone as much redefinition and clarification as that of H-1 temporary worker of distinguished merit and ability. The two policy directives issued by INS during the fall of 1985 should serve to remove some of the ambiguities that remain and to offer greater precision to the proper use of this classification. INS intends to publish a revised set of regulations for this classification sometime in 1986.

To qualify for H-1 classification, aliens must be pursuing scholarly or professional objectives within the framework of *temporary* positions. They must have the requisite professional training and experience to assume a professional position with an employer, and the position they fill must require the services of a "member of the professions." At one time, INS construed the minimum requirements to consist of a graduate degree, publications, and statements by experts in the field attesting to the "distinguished merit and ability" of the alien. In recent years, court rulings have made it clear that any alien who has the education or training to be considered a "member of the professions" may be granted H-1 status, and INS now makes determinations on H-1 petitions within the context of these rulings. Thus, an alien with a B.S. degree in

chemical engineering would, in all likelihood, qualify for this classification; one with a B.A. degree in history would not, since the latter is not commonly viewed as imparting to its recipient the ability to assume professional level job responsibilities. INS does appear determined to retain baseline standards for H-1 classification in several respects: it is usually reluctant to accept work experience, even that of many years duration, in lieu of formal education and completion of a degree program, and it is equally reluctant to classify in H-1 status a person who is to assume a position that does not clearly require "professional" skills.

The H-1 classification differs in a number of critical respects from the J-1 classification:

1. Aliens in H-1 status are *not* subject to a home country residence requirement and are thus able to change to other immigration classifications if they meet appropriate criteria. Only certain J-1 exchange visitors have this freedom.

2. Aliens in H-1 status must be employed and paid by the American firm, organization, or institution which files the H-1 petition, and the pay must be substantial enough so that alien is not likely to become a public charge. With J-1 exchange visitors, the financial support can come from any source.

3. Aliens in H-1 status can remain in the United States for up to five years (a sixth year is possible in extraordinary situations) if the position filled remains a temporary one. J-1 exchange visitors in teaching and research are limited to three years.

4. Any organization offering employment may file an H-1 petition. Only organizations authorized by the U.S. Information Agency may issue the necessary form for the issuance of a J-1 visa.

5. The processing time for an H-1 petition usually ranges anywhere from one to three months. An alien abroad cannot obtain the visa to enter the United States until this processing has been completed by INS, and an alien in the United States cannot start employment with the H-1 petitioner until the processing is complete. Since no petition is processed in the case of J-1 exchange visitors, the alien can obtain a visa at an American embassy or consulate upon receipt of the Form IAP-66.

6. Under new tax law provisions, it appears that H-1 aliens are eligible to become resident aliens for tax purposes once they have met certain "substantial presence" criteria. In most instances, the result is a lower effective tax rate than is the case for aliens who are classified as nonresident aliens for tax purposes. Researchers and professors in J-1 status must be in this country for at least two years before they can qualify as resident aliens for tax purposes. (J-1 exchange visitors covered by certain tax treaties between their governments and the United States may be totally exempt from United States income tax for fixed periods of time).

The recent INS policy directives of 1985 on the H-1 classification has introduced a new concept, that of "dual intent." The policy directive states that "the Service recognizes that a petitioner may legitimately have 'dual intent'—to use the services of an alien for a temporary period and, at the same time, intend to permanently employ the alien when the petitioner can legally do so; the alien may also legitimately have 'dual intent'—to come to the United States temporarily and depart voluntarily at the end of his or her authorized stay and, at the same time, seek to become a permanent resident of the United States at some future date." This should serve to alleviate a major concern of institutions considering offering an alien a long-term teaching or research appointment but wishing to employ the alien quickly. Using this concept of "dual intent," the school could employ the alien for a year or two in a temporary appointment in H-1 status while it takes the necessary steps to determine whether the alien and the school wish to enter into a permanent agreement and whether the alien is eligible for permanent residence through the submission of a labor certification (see section on immigrant or permanent resident, page 30–39).

The policy directives of 1985 also place a limit of five years (six years in extraordinary circumstances) on the length of time an alien may hold H-1 status. It also expresses the intention of changing the regulations in 1986 to provide for an initial authorized stay of up to three years and an extension of stay of up to two years, or any combination of initial stay and extensions of stay which would total five years. Until the regulations are revised,

H-1 aliens may receive an initial stay of up to two years and extensions of stay in increments of one year under the existing regulations.

The documents needed for filing an H-1 petition include a copy of the highest degree awarded to the alien, certified by a United States consular officer, immigration officer, or a lawyer licensed to practice in a state in the United States (not a notary public); a letter from the employer clarifying the temporary and professional aspects of the projected employment and the basis for its conviction that the alien has the requisite professional skills; and the H-1 visa petition, Form I-129B, which can be filed by any organization offering employment. An H-1 petition is filed by the employer with the INS office having jurisdiction over the place of employment.

After a processing time of one to three months, INS will send notification of approval directly to the American embassy or consulate at which the alien will apply for the visa (the employer may save a week of time by offering to pay for INS to send this notification by cable). If the alien is in this country in a different status, the alien must apply for a change of status at the same time that the H-1 petition is submitted. If the alien is in this country in H-1 status secured by another employer, the new employer must file a new Form I-129B and the alien must simultaneously apply for extension of stay, on form I-539, under the new employer's petition. In all instances, the alien is not authorized to commence employment until the petition is approved. Any employment prior to the approval is likely to be considered unauthorized employment with potentially serious consequences for the alien.

H-2 Temporary Worker

The H-2 temporary worker classification does not require any minimum educational or professional accomplishment. An alien who had never attended college could be eligible. By means of a labor certification request, the employer must show clearly that he or she has been unsuccessful in genuine attempts to find United States workers with the necessary skills to perform the temporary job in question. Not only does the labor certifica-

tion require a great deal of effort and documentation, but it is likely to be denied unless there is a clear shortage of workers with similar skills in this country. There are instances, however, in which a university might consider this status for aliens who do not have a college degree (or otherwise do not qualify for H-1 status) or who may be engaged in work that is only quasi-academic, e.g., an alien who is skilled at cataloging certain library materials from his or her country.

Documents needed for the H-2 visa include the H-2 visa petition (Form I-129B), and a labor certification request on Forms ETA 750 A and B. Approval notices are transmitted in the same way as for H-1 status (see above).

H-3 Trainee

While the H-3 trainee classification often seems tempting, it is used infrequently by academic institutions, primarily because an employer will succeed with a petition for this status only if it can be demonstrated that a special *training* program will be made available to the alien. If the alien will be working on a research project, for example, it cannot be argued in most instances that he or she is receiving special training in the narrow sense that is applied by INS. An alien who would be given training in the use of the electron microscope might qualify, but if that alien already has mastery of this skill and is to use it for a research purpose, that is not construed to be training. Documents needed for this visa include the H-3 visa petition (Form I-129B) and a detailed explanation of the training program to be offered. No labor certification is required, nor is there a need for documentation of academic accomplishment, but the alien's academic background should be cited so that INS can understand how it is related to the proposed training and why the employer is interested in offering the training.

Immigrant or Permanent Resident

An immigrant or permanent resident is a person who has been admitted to the United States for the purpose of remaining here indefinitely. An immigrant posseses a "green card," or Alien Reg-

istration Receipt Card, Form I-151 or I-551, which is described on page 3 of this booklet. An immigrant is eligible to apply for United States citizenship after residing here for five years (three years if the alien is married to a United States citizen), but is not obligated to do so. An immigrant may engage in employment without permission from INS, and in many respects is treated like a United States citizen. However, there are distinctions between citizens and immigrants which go beyond the right to vote and hold office. For example, an immigrant convicted of possession of narcotics can be deported, and an immigrant is not eligible to hold a federal civil service position. Furthermore, an immigrant who works overseas for an extended period of time (more than two years) and who fails to maintain a residence in the United States might forfeit his claim to immigrant status and be forced to start the application procedure all over again.

In broad terms it is fair to say that eligibility for immigrant status is limited to the following three types of persons:

1. Aliens who have family members who are United States citizens or permanent residents, i.e., the spouse or child of a United States citizen; the brother, sister, or parent of a United States citizen who is at least 21 years old; or the spouse or unmarried son or daughter of an immigrant. These family members can be classified under the immigration law as immediate relatives or first, second, fourth, or fifth preference immigrants through the submission of certain documents to INS or a United States consular officer.

2. Persons who are unable or unwilling to return to their countries because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" and who thus might qualify for refugee or asylee status.

3. Aliens who qualify because of their occupational skills, specifically those who are "members of the professions" or who possess "exceptional ability in the sciences or arts" (third preference) or persons who are "capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable

and willing persons exists in the United States" (sixth preference). Foreign scholars who are offered permanent or long-term positions in academic institutions may qualify as either third or sixth preference immigrants.

Foreign scholars wishing to immigrate to this country on the basis of a family relationship to a United States citizen or permanent resident can do so through their own initiative without assistance from a prospective employer. The same is true of refugees and asylum applicants. However, the efforts of a prospective employer are essential in the case of an alien seeking third or sixth preference immigrant status. The ensuing application process is often complicated and time-consuming. The chances of success are greatly enhanced when this process is executed with skill and care. Faculty members are urged to consult the foreign student adviser at the *earliest possible time* when there is a likelihood that a permanent faculty or research position will be offered to an alien. A brief summary of the requirements is offered here to alert faculty members to some of the delays and problems they may encounter.

Labor Certification. The first, most difficult, and most significant requirement for an alien seeking third or sixth preference classification is that of a labor certification. A labor certification is a determination and statement by the U.S. Department of Labor (DOL) that there are no qualified United States workers (or *equally* qualified United States workers in the case of aliens offered teaching positions) available for the position at hand and that the employment of an alien will not adversely affect the wages and working conditions of other United States workers in the field. Thus, the employer must demonstrate to the satisfaction of the DOL (1) that the wages and working conditions offered will not depress this segment of the labor market in any way and that the employer is not hiring "cheap foreign labor"; (2) that the alien selected for the position of teaching faculty member is *better* qualified for the position than are any of the United States applicants who may be available for the position, or that, in the case of a position other than that of a teaching faculty member, there are no minimally qualified United States workers avail-

able for the position. The DOL requires that employers conduct a good faith search for qualified applicants; that advertising be done through the most appropriate channel for the position involved (for most academic positions this will involve notices in professional journals and announcements to all institutions likely to have candidates in that discipline); and that there be strict compliance with detailed recruitment and selection procedures.

Applications by academic institutions will usually fall into one of the following categories:

Teaching Faculty Members. To obtain a labor certification for a prospective faculty member, the institution must demonstrate that the alien was selected as the result of a competitive recruitment and selection process and that the alien was found to be better qualified than any United States applicant for the position. The institution is required to document the search process, show how the position was advertised and candidates were recruited, and satisfy the DOL that the institution made a good faith effort to recruit the best qualified person for the position, regardless of United States citizen or alien status. Specific reasons for which United States candidates were not selected must be provided with some precision. The detailed requirements for documenting the recruitment and selection process should be borne in mind from the outset, so that if an alien is selected for a position, the institution is readily able to document adequately the procedures that were followed.

Aliens of Exceptional Ability. The DOL determined long ago that there is a shortage of qualified persons in certain occupations. These are listed on "Schedule A," and aliens who are qualified in Schedule A occupations can be granted *blanket certification* (precluding the need for the more painstaking *individual* certification procedure described above) by virtue of their qualifications only. Schedule A at one time included virtually anyone who could be considered a member of the professions. Since 1973, Schedule A has been reduced dramatically, and it now includes an extremely limited range of occupations, e.g., nurses and physical therapists. The most relevant part of Schedule A for academic institutions is that of Group II, "aliens of exceptional ability in the

sciences or arts including college and university teachers of exceptional ability."

In order to qualify for labor certification as an alien of exceptional ability under Schedule A, Group II, an alien must demonstrate that he or she is accorded widespread acclaim and international recognition. Application for labor certification under Schedule A is made to an INS office. The DOL regulations include a list of seven ways in which an alien may substantiate the claim of exceptional ability and international recognition. If the alien fulfills any two of these, he or she is likely to be granted Schedule A certification. The list includes "documentation of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought"; and "evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international journals or professional journals with an international circulation."

When an institution wishes to offer long-term employment to a distinguished alien with major academic accomplishments, this channel to a labor certification should be given full consideration.

Other Employees. If an academic institution wishes to apply for a labor certification for a prospective employee other than a teaching faculty member or a person who will qualify as being of exceptional ability, the institution must demonstrate that the alien is being offered wages and working conditions which are normal for the occupation and that there are no United States workers available who are even minimally qualified for the position. Thus, the institution is not allowed to select the *best* qualified person for a position if a labor certification is being sought; it can obtain the certification only if there are no United States workers who are minimally qualified for the position, even if the alien is better qualified than the United States workers. The job description and required qualifications stated in the original advertising are the standard against which all questions of needed qualifications are measured. If it is narrowly drawn, citing job requirements with great specificity, it will be less likely that applicants other than the person considered to be the top candidate will possess the full

set of minimal qualifications. On the other hand, the job description may not contain "unduly restrictive job requirements." In many situations, little or no thought is given to the possibility that an alien will be offered the position at the time the initial job description is drawn. Institutions would be well advised to consider this possibility in writing up all job descriptions for long-term positions if there is any chance that an alien will be selected as the top candidate.

Two other cautions are worth noting for research scholars. The DOL will require clear assurance that the research position in question is really a permanent or long-term assignment. The DOL is aware that many research positions have a very finite lifespan, often extending for just two or three years, depending on the life of a contract or a grant. If the DOL perceives the position to be temporary, it will deny the labor certification. Furthermore, there is strong interest on the part of the DOL in ascertaining that the grant funding supporting the research work has a high likelihood of being renewed for many years if the research position is to be seen as a permanent one. Guarantees can rarely be offered in good conscience, but indications of high probability, based on past experience and the stated level of interest by the funding agency, are often acceptable.

Numerical Limitations. The immigration law provides for a maximum of 270,000 immigrants per year (exclusive of immediate relatives, refugees, and certain special immigrants). The 270,000 annual limitation is shared by the six preference classifications each of which is assigned a certain percentage of the total, e.g., 10 percent for third preference (27,000). In addition, any one country can be allocated a maximum of 20,000 immigrant visas per year, and any one colony or dependency a maximum of 600 visas per year. Because of these limitations by preference and by country, not all persons who qualify for one of the preferences will have a visa immediately available to them, i.e., will be immediately eligible for an immigrant visa. In such a case, the preference category and/or the country maximum are said to be "oversubscribed" or "backlogged."

In recent times, third preference has been over-

subscribed for most of each year and the waiting period has varied between six and 12 months. In the case of some countries, e.g., the Philippines, and one colony, Hong Kong, the backlog for third preference has been far more substantial and has proven to be a major deterrent for aliens born there. The waiting period for sixth preference would not prove to be a viable alternative for many aliens to be employed by universities and colleges. Note, however, that in the case of the Philippines and Hong Kong, the sixth preference backlog is *less* than that for third preference. The availability of immigrant visas in each preference classification and for each country varies greatly from time to time. Faculty members should consult the foreign student adviser for detailed current information.

Qualifying for Third or Sixth Preference. If the employer and the alien are successful in obtaining a labor certification, the next step is to establish the alien's eligibility for third or sixth preference classification. This is done by filing a third preference petition, Form I-140, with INS. The petition must include official or certified documents establishing that the alien actually has the qualifications which are claimed and which are necessary to qualify as a "member of the professions." INS requires from one to three months to process third and sixth preference petitions. When the petition is approved, the employer and the alien are notified; if the alien is outside the United States waiting to apply for an immigrant visa, INS also notifies the United States consular office where the alien will apply for the visa.

Because the third and sixth preference classifications are both oversubscribed and will probably remain so for some time, an immigrant visa will not necessarily be immediately available when a preference petition is approved. Therefore, the alien will have to wait until a visa is immediately available before making application for an immigrant visa at a consular office or for adjustment of status at INS. In practice, this waiting period affects the timing of the filing of a third or sixth preference petition. If the alien is outside the United States and will apply for an immigrant visa, the employer will usually file the preference petition immediately upon receipt of the labor certification. If the alien

is in the United States and will apply for adjustment of status at an INS office, the employer will usually file the preference petition simultaneously with the alien's filing of the application for adjustment of status. It is not necessary to hurry the petition, since the alien is considered to have entered the waiting list for a visa as of the date on which the labor certification was filed. That date is known as the alien's priority date. If the alien is in the United States and wishes to continue to be employed while waiting for an immigrant visa to become available, it is necessary to preserve an appropriate nonimmigrant classification which permits employment. If the alien does not do this or is unable to do this, any employment would be considered unauthorized and the alien would be statutorily ineligible for adjustment of status to permanent residence in the United States. In that case, the applicant would have to leave the United States and apply for an immigrant visa at a consular office abroad rather than adjusting status in the United States.

Obtaining an Immigrant Visa Abroad. The final step in acquiring an immigrant visa for an alien who is abroad consists of applying to a United States consular officer. The application includes documents such as a biographical data sheet, birth certificate, medical certificate, and requires a personal interview. The alien's dependents, i.e., spouse and unmarried children under 21 years of age, can apply for immigrant visas in the same classification as the alien and will normally receive their visas at the same time as the principal. A wait of two to three months following the application to the consulate is not uncommon before the immigrant visa is issued and entry to the United States becomes possible.

Adjusting to Immigrant Status in the United States. If the alien seeking immigrant status is in this country, he or she can apply to INS for adjustment of status to permanent resident if the following conditions have been met: (1) the alien has maintained a legal nonimmigrant status; (2) the alien has not worked without authorization; and (3) an immigrant visa is immediately available. The alien files the application for adjustment of status on Form I-485, to which are attached a biographical statement, fingerprint chart, medical examination rec-

ord, and other documents. In adjustment of status cases, the third or sixth preference petition is usually filed simultaneously with the application for adjustment of status. The third preference petition may be prepared by either the alien or the employer although it is most logical and convincing if the employer prepares it; the sixth preference petition may be prepared by the employer only.

Different INS offices follow different procedures from this point forward. Some offices follow what is called the "one-step" procedure and conduct an adjustment of status interview with the alien at the time of the filing of the application, then notify the applicant of the decision on the application after the processing is completed (two or three months). Other offices accept the application and make an appointment for the applicant to return in two to three months for the adjustment of status interview, at which time a decision is made on the adjustment application. In either case, INS will normally grant work permission to the applicant at the time the application for adjustment of status is filed if the applicant requests it. Therefore, once the alien files the application for adjustment of status, employment can be authorized, even though the applicant is generally considered to have given up any nonimmigrant status by virtue of having filed an application for permanent residence.

During the time an alien awaits a decision on the application for adjustment of status, he or she may not go out of the United States and re-enter unless INS grants the privilege of advance parole for re-entry. INS will grant advance parole only in cases of business necessity, such as required attendance at an international conference, or family emergency, not for the convenience of the alien.

Time Required for Processing. One of the most serious problems involved in planning for hiring aliens for permanent positions is the amount of time necessary to move through all the stages of the process and achieve immigrant status for the alien. It might prove useful to lay out the range of time that might prevail in each of the four main stages:

1. Preparing the labor certification . 1–3 months

2. Processing of the labor certification ..... 1–6 months
3. Waiting period caused by third preference backlog ..... 0–9 months
4. Third preference petition approval and granting of immigrant visa (or adjustment of status) ..... 2–4 months

As can be seen, the total amount of time involved can range from a minimum of six months to a period of almost two years (longer in the case of countries with special backlog situations). It is only the first stage over which the institution has any control. It should move with all deliberate speed through this part of the process and make certain that it monitors the projected time for each stage so that appropriate actions can be taken quickly and so that the alien is fully apprised of movement toward the next stage and the importance of keeping the current nonimmigrant status intact.

Important Related Matters

Institutional Policy and Staffing

Although the decisions as to which students to admit and which scholars to invite, and for what purposes, are usually the responsibility of individual academic departments or units, there are some compelling reasons for the existence of certain institution-wide policies. An important policy action taken by many institutions is reflected in the commitment to employ staff who have developed a high degree of knowledge and expertise on immigration matters and who have sufficient time and resources to serve all of the immigration needs of students and scholars. Immigration work is technical, complex, and time-consuming, and it must be done thoroughly and precisely. The National Association for Foreign Student Affairs (NAFSA) is able to offer institutions publications and other tools that can facilitate the development of policies and help in the training of staff to work on immigration matters.

Unauthorized Employment

When an alien accepts employment which is not authorized or when an alien who entered this country without documentation accepts employment, such actions constitute serious violations of status and law and are grounds for the deportation of such aliens. The employer of the alien does not violate any federal law. Legislation to make employers legally culpable has been passed three times by the United States Senate but has not become law as of this writing (February 1986). A few states have enacted laws which impose sanctions on the employers of aliens who are not authorized to work, but generally these state laws have not been very effective and are seldom enforced. Therefore, as matters stand now, only the alien, and not the employer, is vulnerable to legal action for working without authorization.

Yet, there are at least four important reasons for an institution to follow a policy of not employing aliens who are not authorized to work:

1. It is against the law for the alien to accept employment without authorization and the alien faces serious consequences for flouting this law;

2. Disregard of the law by the institution is not conducive to building the responsible, public-spirited image which most colleges and universities seek;

3. In the absence of new legislation, INS has undertaken several strategies to make life difficult for employers who ignore the law, including work-place raids, some of which have been ruled to be legal by the Supreme Court;

4. An institution would find it difficult to make its many constituent parts pay heed to the many immigration conditions and procedures described in this booklet if it were known that the institution offers employment to aliens who have bypassed these conditions and procedures. An institution may well identify certain special circumstances in which it may choose not to apply these conditions with absolute rigidity, but it should recognize such actions as clearly acknowledged exceptions, not the rule.

Immigration Attorneys

One measure of the kind of effort and enterprise which is necessary to perform immigration tasks well is the fact that a skilled immigration attorney charges a fee of from $2,500 to $5,000 to file an application for labor certification and immigrant status and to see the case through to its end. In most instances, it is unnecessary for an institution or a prospective foreign faculty member to retain an attorney for adjustment of status, since a skilled foreign student adviser is usually capable of putting the applications together and guiding the academic department and the alien through the process. However, when special problems arise, such as unusual delays in the availability of immigrant visas, possible gaps in the time of authorized employment, appeals of a denied labor certification or third preference petition, or similar matters, it is wise for both the institution and the alien to consider retaining an attorney to guide them through the particular difficult situation. For that reason, it is prudent to have knowledge of skilled immigration attorneys to whom scholars and students can

be referred with confidence when that need arises. The names of experienced and knowledgeable immigration attorneys can be obtained through the local chapter of the American Immigration Lawyers Association or through local bar associations.

Expectations of Scholars

Faculty members who agree to host a foreign scholar should take pains to ensure that they have a full understanding of what the scholar expects in the way of facilities, collaboration, time of departmental colleagues, and similar matters, so that a serious disappointment does not result. With nonsalaried scholars, for example, faculty members may have a tendency to believe that simply extending the invitation is enough and that the scholar will be self-sufficient once here. For some scholars this may be true, but it is wise to clarify these expectations at the time the invitation is extended.

Support Services

In addition to having staff who can properly handle complex immigration matters, it is essential that an institution also have staff who provide important nonacademic information and supporting services relating to housing, orientation to the community and its schools, English language programs for spouses (and sometimes for the students and scholars themselves), cultural and recreational programs, and similar matters. Usually it is the foreign student adviser who is responsible for ensuring that such services are provided to foreign students. In recent years there has been growing recognition that similar services should be provided to foreign scholars as well. Good communication is essential between the person responsible for foreign scholars and the academic departments to ensure that there is a mutual understanding as to which office has the primary responsibility for each area of service to scholars.

Health Insurance

The institution should take steps to be certain that all foreign students and scholars have the opportunity to enroll in suitable health insurance

programs and that they are strongly urged to do so. Some schools have adopted a policy of requiring health and accident insurance for all enrolled foreign students and all employed foreign scholars. The foreign student adviser usually provides information about health insurance to foreign students, but sometimes neglects foreign scholars, who are equally in need of this information. Because of the age of many foreign scholars, they may have a greater need for health insurance than students. Most foreign students and scholars come from countries which have some kind of national medical plan or health care service, and it is very difficult for them to understand that a week in a hospital in this country is likely to cost $4,000–$5,000 or more.

Federal and State Income Taxes

In most cases, foreign students and scholars pay federal and state income taxes if they are employed. In certain instances they can be exempted from those taxes if there is an income tax treaty between the United States and their country of residence, or if their employment can be considered to be in the nature of a fellowship. In January 1985, a revision to the federal tax law made it difficult for most foreign students and scholars to qualify for resident alien status for tax purposes. In the past, most of them who were in the United States for more than a year were able to meet the criteria for resident status and pay essentially the same tax as United States citizens. With the coming of the new law, F-1 aliens are not able to attain this status until they have been in the country for five years; the same conditions apply to J-1 students. J-1 researchers and professors are eligible to secure resident status after two years in this country. H-1 aliens, however, will be able to enter this status in a much shorter time if they meet the "substantial presence" criteria. The majority of our foreign students and scholars will, thus, be nonresident aliens for tax purposes and will not be able to file joint returns; will not be able to claim the standard deduction; and will be able to claim only themselves as personal exemptions; and their taxes will normally be withheld at the regular graduated rate. The one

advantage of nonresident alien tax status is that tax is paid only on income earned in the United States.

Tax matters are even more complex for aliens than they are for United States citizens. It would be helpful to have local tax attorneys or tax accountants as resources if they are familiar with the special conditions that apply to alien taxation. A number of schools are sponsoring special workshops on this subject and many are preparing written guidelines on the subject for their foreign students and scholars.

Social Security Tax

Foreign students and scholars who hold F-1 student or J-1 exchange visitor status do not pay Social Security tax (FICA) if they are authorized to be employed. All other aliens do pay Social Security tax if their employment comes under the Social Security system. Most aliens will find that they need Social Security numbers for a variety of purposes. Any alien may obtain a Social Security number by applying in person to the local Social Security office with a passport and valid Form I-94 in hand. It should be noted and understood that possession of a Social Security card and number does not in itself constitute authorization to be employed. In fact, some Social Security cards issued to aliens carry a prominent notation "Not valid for employment." Because of over-generalized and inaccurate interpretations of the immigration regulations by Social Security personnel, this usually does not mean exactly what it says. Faculty members should consult the foreign student adviser or equivalent campus officer for interpretations of what that notation means for specific individuals.

Federal Financial Aid

Foreign students in F-1 or J-1 status, and those in most other nonimmigrant classifications, are not eligible to receive federal financial aid in the form of Pell grants, federal work/study programs, guaranteed loans, and similar programs, as these programs are designed to serve citizens and residents of the United States. Students who are immigrants or refugees usually *are* eligible for such aids. The

distinctions are complicated, and faculty members are urged to contact the foreign student adviser and/or the financial aid office for more precise information about financial aid which may or may not be available to any particular student.

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It is hoped that the information presented in this booklet will be helpful to faculty members and other campus constituencies in understanding some of the ways in which immigration laws and regulations affect the educational programs and future plans of foreign students and scholars. Faculty members are urged to maintain close liaison with the foreign student adviser and any other campus officials who are responsible for representing the institution in dealing with foreign students and scholars. Those persons, usually members of NAFSA, have available to them written materials, knowledgeable colleagues, and other resources through NAFSA and related professional organizations and through their frequent contact with government officials who administer the immigration regulations.

Although foreign student advisers are sometimes the bearers of unwelcome news and thus may be mistakenly perceived as adversaries or the extensions of government agencies, they are true allies of the faculty in carrying out the international educational objectives of the institution.

Major Types of Visas (Immigration Status)

TYPE OF VISA (IMMIGRATION STATUS)	TIME NEEDED	POSSIBLE INCOME FROM U.S. SOURCE(S)	PROBABLE TAX STATUS	ELIGIBILITY CRITERIA	MAXIMUM LENGTH OF U.S. STAY	ADVANTAGES	DISADVANTAGES	SUPPORTING DOCUMENTATION NEEDED	GOVT. FORMS REQUIRED
B-1 VISITOR FOR BUSINESS	1-3 weeks	Reimbursement for travel and subsistence only; no honorarium or salary	Nonresident alien	Proof of academic or business purpose of visit to United States	6-12 months (renewable)	Quick and relatively easy visa to obtain and use many times; no government form or petition required	No honorarium for lecture or consultation from U.S. source	Letter of invitation indicating nature of academic enterprise	NONE
B-2 VISITOR FOR PLEASURE	1-3 weeks	NONE	Nonresident alien	Evidence of financial support and of tourist plans	6 months (renewable)		Limited stay in U.S.; no income from U.S. source permitted	Proof of adequate finances for trip	NONE
F-1 STUDENT (including post-doctoral students)	2-9 weeks	Employment on campus permitted; off-campus work allowed only in case of unexpected need after one year in the U.S.	Nonresident alien for five years	Admission to academic course of study or offer of postdoctoral research position; evidence of adequate financial support for length of program; indication of adequate English or chance to improve	As long as academic progress continues	Easy to move to other status when applicable; not subject to home country residence requirement	Off-campus work severely limited except for post-degree practical training (12 mos.); spouse unable to work	Proof of academic admission or invitation for postdoctoral research shown on I-20; evidence of financial support for length of program	I-20A-B
H-1 TEMPORARY WORKER OF DISTINGUISHED MERIT AND ABILITY	2-4 months	Unlimited income from petitioning university or organization; no other income without petition from new employer	Resident alien if present in U.S. for most of year	Possession of professional degree and skills; indication that position to be filled requires professional skills and is temporary	First period up to 2 years, renewable to total of 5 years	May have long-term intent to immigrate; not subject to home country residence requirement	Can require long time to obtain; more supporting documentation needed	Certified copy of highest degree, employer letter giving professional education/skills needed and possessed by alien; Detailed explanation of proposed training program	I-129B
H-3 TRAINEE				Invitation to specific training program in alien's professional field	Up to 3 years	Not subject to home country residence requirement			
J-1 EXCHANGE VISITOR students	2-9 weeks	Unlimited income for work on campus; off-campus work possible with sponsor's approval	Nonresident alien for five years *	Admission to academic program with sponsorship; evidence of adequate financial support for length of program	As long as academic progress continues	Relatively easy and quick to obtain; spouse may work; subject to get off-campus work permit (then as F-1)	Subject to two-year home country residence requirement if funded by U.S. or home government, or in skills list, or medical graduate	AP-66 from program sponsor with details of academic objectives and financial support	AP-66
researchers, professors		Unlimited income for work on campus in pursuit of academic objective; off-campus work permit difficult to obtain, especially in industry	Nonresident alien for two years *	Invitation to teach, lecture or conduct research; indication of adequate financial support for length of program	Up to 3 years	Relatively easy and quick to obtain; spouse may work			
M-1 STUDENT	2-9 weeks	No employment permitted except six months of post-degree practical training	Undetermined	Admission to vocational or technical program; evidence of adequate financial support for length of program; indication of adequate English or chance to improve	As long as academic progress continues	Only visa open to vocational and technical students	Many (visa/visa/gate, not permitted to change objective after six months or change to F-1, etc.)	Proof of admission to vocational or technical program and evidence of financial support for entire program	I-20M-N
IMMIGRANT PERMANENT RESIDENT	6-12 months (longer in some cases)	No restrictions	Resident alien	Professional skills for particular positions when U.S. workers not available; family members of U.S. citizen; refugee or asylee	Indefinite (Naturalization optional after five years)	No need for work permits or extensions of stay; free to make long-term plans to stay in the U.S.	Extensive time, effort, documentation needed to obtain	Labor certification (based on professional skills and non-availability of U.S. workers); much specific information needed	ETA 750 A + B I-140 or I-130

*May receive tax exemption through tax treaty

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